APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed Feb. 13, 2004]

Civil Action No. 3:02-CV-0835-L

BRENDA J. OWENS,

Plaintiff,

v.

EXCEL MANAGEMENT SERVICES, INC. and
VARTEC TELECOM, INC.,

Defendants.

MEMORANDUM OPINION AND ORDER

Before the court are Excel Management Services, Inc.'s Amended and/or Supplemental Motion for Summary Judgment, filed October 31, 2003; and VarTec Telecom, Inc.'s Amended and/or Supplemental Motion for Summary Judgment, filed October 31, 2003.[1] After careful consid-

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[1] The history related to the motions for summary judgment is tortuous and reminiscent of the labyrinths referenced in Greek mythology. Defendants filed their motions for summary judgment and appendices on August 29, 2003. Plaintiff filed her appendix to her response on September 18, 2003 and her response on September 19, 2003. On September 22, 2003, Plaintiff filed a supplement to her appendix in which she attached two pages of deposition testimony that were inadvertently omitted from her appendix. On October 3, 2003, Defendants filed their replies. On October 7, 2003, Defendant Excel Management Services, Inc. supplemented its appendix by attaching the corrigenda page of a deposition used by Plaintiff in her response. On October 31, 2003, Defendants filed amended motions for summary judgment to correct an "administrative oversight" in which they failed to move for summary judgment on Plaintiffs state law discrimination and retaliation

eration of the motions, responses, replies, summary judgment evidence, record and applicable law, the court grants Excel Management Services, Inc.'s Amended and/or Supplemental Motion for Summary Judgment; and grants VarTec Telecom, Inc.'s Amended and/or Supplemental Motion for Summary Judgment.

I. Factual and Procedural Background

This is an employment discrimination and retaliation case. Plaintiff Brenda J. Owens ("Plaintiff" or "Owens"), a 52 year-old [2] African-American female, worked as Director of Corporate Tax for Defendant Excel Management Services, Inc. ("Excel") from March 13, 1995 until October 19, 2001. As such, Owens managed Excel's tax department and provided other tax related services to Excel. Owens reported to Mike Lavey, a 43 year-old white male, who was the Vice President/Controller of Excel. In addition to the tax department, Lavey had supervisory authority over the departments ofrevenue accounting, revenue operations, and treasury. Lavey reported to Jim Timmer, a 42 year-old male, who was an Executive Vice President/Chief Financial Officer for Excel. In October 2001, Excel initiated a company-wide reduction in force ("RIF"). As part of the RIF, Lavey made the decision to eliminate two positions: Director of Tax, which was held by

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claims in their original motions. Defendants also filed supplemental appendices in which they attached the evidence necessary to support their amended motions. On November 4, 2003, Defendant Excel Management Services, Inc. filed a corrected copy of its amended summary judgment brief. On November 13, 2003, Plaintiff filed her response to Defendants' amended motions for summary judgment. On November 21, 2003, Plaintiff filed an amended response in which she attached a table of contents and a table of authorities that were inadvertently omitted from her response of November 13, 2003. On November 26, 2003, Defendants filed their amended replies.

[2] All references to age are calculated as of the date of Owens's termination, October 19, 2001.

Owens, and Revenue Specialist, which was held by Kevin Crews ("Crews"), a 32 year-old white man. On October 19, 2001, Owens's employment with Excel was terminated.

During this same time period, VarTec Telecom, Inc. ("VarTec") was in the process of acquiring Excel. As Director of Corporate Tax, Owens worked with several VarTec employees, including Sonya Ayers ("Ayers"), regarding the impending acquisition. Ayers, a 41 year-old white female, was the Vice President of Finance Integration for VarTec. After hearing of Owens's termination, Ayers informed Owens of the vacant Director of Tax position at VarTec. Shortly thereafter, Owens applied for the position. Ayers, however, was not the final decisionmaker with respect to this position. Instead, VarTec's Chief Financial Officer Gary Egger ("Egger"), a 53 year-old white male, was the decisionmaker. Egger hired Neil Keeter, a 35 year-old white male, for the vacant position.[3]

After exhausting her administrative remedies, Owens filed this lawsuit alleging claims of race, sex, and age discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e, *et seq.*; the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*; and the Texas Commission on Human Rights Act ("TCHRA"), Tex. Lab. Code Ann. § 21.001, *et. seq.*; and a claim of "aiding and abetting" in violation of § 21.056 of the Texas Labor Code. Excel and VarTec (collectively "Defendants") subsequently moved for summary judgment. The court now considers these motions.

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[3] The title of the vacant position was changed to Senior Director of Tax in order to accommodate Keeter's salary requirements. The primary duties and responsibilities of the position were not affected.

II. Summary Judgment Standard

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986); *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Ragas*, 136 F.3d at 458. Further, a court "may not make credibility determinations or weigh the evidence" in ruling on motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 254-55.

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 586. Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *See Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994). The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that

evidence supports his claim. *Ragas*, 136 F.3d at 458. Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.; see also Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5'h Cir.), *cert. denied,* 506 U.S. 832 (1992). "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Disputed fact issues which are "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion. *Id.* If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322-23.

III. Analysis

A. Applicable Standard of Proof

Owens and Defendants disagree regarding the applicable standard of proof on her discrimination claims. Owens maintains that the holding in *Desert Palace, Inc. v. Costa*, ___ U.S. ___, 123 S.Ct. 2148, 2150, 156 L.Ed.2d 84 (2003) dictates that "summary judgment should only be granted in employment discrimination cases if an employer can demonstrate that the employee has failed to raise a genuine issue of material fact concerning whether or not a protected characteristic was a motivating factor in an employment decision." Pl. Am. Resp. at 8. In other words, Owens contends that the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden-shifting framework is no longer applicable.

Defendants counter that *the McDonnell Douglas* burden-shifting framework is applicable despite *Desert Palace.* The court agrees. *Desert Palace* simply makes clear that direct evidence of discrimination is not necessary to obtain a mixed-motive jury instruction under Title VII. 123 S .Ct. at 2150,

2155. If Owens's suggestion that the *McDonnell Douglas* burden-shifting paradigm no longer exists after *Desert Palace* is correct, such a change would constitute a revolution in employment discrimination law. If the Supreme Court were going to make a draconian departure from 30 years of well-established employment law precedent, the court believes it would have done so with unmistakable clarity. In *Desert Palace,* the Supreme Court does not even intimate that it is overruling, restricting or clarifying *McDonnell Douglas.* Moreover, no Fifth Circuit authority embraces Owens's interpretation of *Desert Palace. See Johnson v. Louisiana,* 351 F.3d 616, 622 (5th Cir. 2003) ("Resolution of a [Title VII discrimination] claim involves a three-step, burden-shifting analysis."); *see also Read v. BT Alex Brown Inc.,* 72 Fed. Appx. 112 (5th Cir. 2003).[4] Accordingly, this case will be analyzed pursuant to the burden-shifting framework under *McDonnell Douglas.* Regardless of the standard applied, the ultimate burden of proving intentional discrimination remains with the plaintiff. *See Texas Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *see also Read*, 72 Fed. Appx. at 115 (citing *Desert Palace*, 123 S.Ct. at 2150).

B. Discrimination

Owens brings claims of race, sex, and age discrimination in violation of Title VII, §1981, THCRA, and the ADEA.[5]

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[4] In *Read,* the Fifth Circuit cited to *Desert Palace;* however, it applied the *McDonnell Douglas* burden-shifting framework to the plaintiff's sex and age discrimination claims. If the Fifth Circuit believed that *Desert Palace* abrogated the burden-shifting framework set forth in *McDonnell Douglas,* it certainly would have deemed it necessary to elevate *Read* to the status of a published opinion, rather than making it an unpublished opinion having no precedential value.

[5] The same standard of proof applies to disparate treatment claims under Title VII and § 1981 when they are urged as parallel causes of action. *Shackelford v. Deloitte & Touche, LLP.*, 190 F.3d 398, 403 n.2 (5th Cir. 1999); *Baltazar v. Holmes*, 162 F.3d 368, 373 (5th Cir. 1998); *Wallace v.*

Under the applicable burden-shifting paradigm for discrimination claims, Owens must establish *a prima facie* case of discrimination; Defendants must then articulate legitimate, nondiscriminatory reasons for their actions; and finally, if the parties satisfy their initial burdens, the case reaches the "pretext stage," and Owens must then adduce sufficient evidence to permit a reasonable trier of fact to find pretext or intentional discrimination. *See McDonnell Douglas*, 411 U.S. at 802-04; *Burdine*, 450 U.S. at 252-53; *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 425-26 (5th Cir. 2000).

1. Discharge Claim

Owens contends that she was discharged because of her race, sex, and age. Excel counters that her race, sex, and age played no part in the decision to terminate her employment; instead, she was discharged pursuant to a company-wide RIF aimed at reducing costs.

In a RIF case, *a prima facie* case under Title VII is established by showing that (1) the plaintiff is a member of a protected class; (2) she was qualified for the position that she held; (3) she was discharged; and (4) after her discharge, "others who were not members of the protected class remained in similar positions." *Bauer v. Albemarle Corp.*, 169 F.3d 962, 966 Cir. 1999) (quoting *Vaughn v. Edel*, 918 F.2d 517, 521 (5th Cir. 1990)). The first three elements of *a prima facie* case under the ADEA are identical to those of *a*

Texas Tech Univ., 80 F.3d 1042, 1047 (5th Cir. 1996). Similarly, claims under TCHRA and Title VII are governed by identical law. *Shackelford*, 190 F.3d at 403 n.2 (citing *Colbert v. Georgia-Pacific Corp.*, 995 F.Supp. 697 (N.D. Tex. 1998)). Further, *the McDonnell Douglas* burden-shifting analysis is also applicable to ADEA discrimination claims. *See O'Connor v. Consolidated Coin Caterer Corp.*, 517 U.S. 308, 311 (1996). As the underlying facts of Owens's Title VII, § 1981, TCHRA, and ADEA discrimination claims are the same, and the evidentiary burdens of these statutes are similar, her claims will be analyzed together.

prima facie case under Title VII. *Bauer*, 169 F.3d at 966 (citing *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993)). For the fourth element in an ADEA case, the plaintiff must show that she was otherwise discharged because of her age. *Id.* (citing *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 150 (5th Cir. 1995)).

(a) *Prima Facie* Case

Excel concedes that Owens can establish the first three elements of *a prima facie* case. The court, therefore, must determine whether evidence exists to establish the fourth element of Owens's race and sex claims, namely, that white males remained in similar positions, and of her age claims, namely, that she was otherwise discharged because of her age. *Meinecke v. H&R Block*, 66 F.3d 77, 84 (5th Cir. 1995).

With respect to Owens's race and sex claims, Excel contends that she cannot establish that white males remained in similar positions because there were no employees who were similarly situated to her or in nearly identical circumstances to hers. In other words, Excel contends that because Owens was the only director-level employee, or "Grade-12" employee, in the tax department, she did not have a "nearly identical" comparator, and therefore cannot establish a Title VII *prima facie* case. Owens counters that she need not show that she was treated differently than a similarly situated individual; rather, she need only present evidence that Excel intended to discriminate in reaching the decision at issue. Owens relies on *Palasota v. Haggar Clothing Co*, 342 F.3d 569 (5th Cir. 2003) to support her position; her reliance on *Palasota*, however, is misplaced.

In *Palasota*, the plaintiff brought suit against his former employer alleging age discrimination in violation of the ADEA and sex discrimination in violation of Title VII. *Id.* at 573. The jury entered a verdict in favor of the plaintiff on the ADEA claim and in favor of the employer on the Title VII

claim. *Id.* After the jury verdict, the district court granted a motion for judgment as a matter of law in favor of the employer on the ADEA claim. *Id.* The Fifth Circuit held that the district court erred in, among other things, holding that the plaintiff had to show that he was treated differently than similarly situated employees who were younger than he. *Id.* at 575. The *Palasota* court reiterated that the fourth element of an ADEA *prima facie* case provides that a plaintiff must show that he was replaced by someone outside the protected class, replaced by someone younger, or otherwise discharged because of his age. *Id.* at 576. The court explained that a plaintiff can establish that he was otherwise discharged because of his age by showing "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Id.* (quoting *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 41 (5th Cir. 1996)).

Owens contends that *Palasota* applies to Title VII cases. The court disagrees. While the evidentiary burdens of the ADEA and Title VII are the same (*O'Connor*, 517 U.S. at 311), the elements of *a prima facie* case under each statute are not identical. *Bauer*, 169 F.3d at 966. The *Palasota* court specifically addresses the fourth element in *a prima facie* ADEA case; no such element exists in *a prima facie* Title VII case.

While *Palasota* is applicable to the court's determination of whether Owens can establish *a prima face* case of age discrimination, it has not yet reached this issue. At this point, the court must determine whether Owens has shown that Excel treated her differently than other similarly situated employees on the basis of race and sex. *See Vaughn*, 918 F.2d at 522. Employees maybe considered "similarly situated" to Owens if their circumstances are nearly identical. *See Okoye v. University of Texas Houston Health Sci. Ctr.*, 245 F.3d 507, 514 (5th Cir. 2001); *Little v. Republic Refining Co., Ltd.*, 924 F.2d 93, 97 (5th Cir. 1991).

Owens points to two other director-level employees, Debra Brandgard ("Brandgard") and Clarence Prestwood ("Prestwood"), who were treated differently than she. Brandgard, a 38 year-old white female, was the Director of Revenue Operations and reported to Lavey. Prestwood, a 49 year-old white male, was the Vice President of Finance and reported to Timmer. Neither Brandgard nor Prestwood worked in the tax department. Excel contends that Brandgard and Prestwood are not appropriate comparators because they were not supervised by the same person as Owens and they performed different job functions than Owens. The court agrees. *See Okoye,* 245 F.3d at 514 (citing *Little,* 924 F.2d at 97) (Employees are not in nearly identical circumstances when their actions were reviewed by different supervisors.); *Hockman v. Westward Communications, L.L.C.,* 282 F.Supp.2d 512, 527-28 (E.D.Tex. 2003) ("[E]mployees with different responsibilities, different supervisors, different capabilities, different work rule violations or different disciplinary records are not considered to be 'nearly identical.'); *Daniels v. BASF Corp.*, 270 F.Supp.2d 847, 854-55 (S.D.Tex. 2003) (Circumstances were not nearly identical when employees did not perform the same functions.). Indeed, Owens failed to establish that she, Prestwood, and Brandgard performed the same or nearly identical functions. Moreover, it is undisputed that Prestwood and Owens were supervised by different persons. Accordingly, Owens cannot demonstrate that she was similarly situated to these employees and therefore cannot establish *a prima facie* case of sex and race discrimination.[6]

As for *a prima facie* case of age discrimination, Owens need only show evidence that Excel intended to discriminate in reaching its decision to eliminate her position during the RIF. *See Palasota*, 342 F.3d 576; *Nichols*, 81 F.3d at 41.

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[6] Even assuming that Owens can establish *a prima facie* case, her race and sex discrimination claims fail for the same reasons her age discrimination claims fail. *See* § II.B(1)(c), *infra.*

This requires only a minimal showing. *Nichols*, 81 F.3d at 41. Excel contends that Owens cannot show evidence that it intended to discriminate by eliminating her position because Lavey also terminated a 32 year-old employee, Crews, and he retained an employee[7] who "was nearly as old as" Owens. Owens counters that (1) she was the oldest employee in the tax department and was the only employee from that department terminated; (2) she was the oldest employee who reported to Lavey; (3) Brandgard and Prestwood, both of whom are younger than she, were originally selected for termination in the RIF but were ultimately retained; (4) her performance evaluations were better than those of Brandgard and Prestwood; and (5) the costs savings associated with her termination would have been less than those costs savings associated with Prestwood had he been terminated; and almost the same, albeit a little higher, than those costs savings associated with Brandgard had she been terminated. Evidence that younger employees were treated more favorably is generally sufficient to shift the burden to the employer in the second stage of the *McDonnell Douglas* framework. The court therefore concludes that Owens has met her initial burden of establishing the elements of *a prima facie* age discrimination case.

(b) Legitimate, Nondiscriminatory Reason

Excel contends that its company-wide RIF, which affected 166 employees and was projected to save 17.2 million dollars in 2002, is a legitimate, nondiscriminatory reason for terminating Owens. Specifically, Lavey decided that "Excel could most safely eliminate Owens's management-level position to cut costs while utilizing the existing staff to maintain the same level of work." Excel. Am. Br. at 18-19. The rebuttal of the presumption created by the *prima facie* case requires only a minimal showing, as does the *prima facie* case itself.

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[7] The employee is Lewis Thomas. He was 52 years old.

Amburgey, 936 F.2d at 813. The court concludes that Excel has set forth a legitimate, nondiscriminatory reason for terminating Owens. *See EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173, 1181 (5th Cir. 1996) (A reduction in force "is itself a legitimate, nondiscriminatory reason for discharge.").

(c) Pretext and Intentional Discrimination

Owens contends that Excel's proffered reason for eliminating her position in the RIF is a pretext. A "plaintiff can survive summary judgment by producing evidence that creates a jury issue as to the employer's discriminatory animus or the falsity of the employer's legitimate nondiscriminatory explanation." *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002). "Pretext-plus" is not required to support an inference of discrimination. *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 223 (5th Cir. 2000). "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated," and may therefore be enough to prevent summary judgment or judgment as a matter of law. *See Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 148 (2000); *Sandstad*, 309 F.3d at 897. This showing, however, is not always enough to prevent summary judgment "if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Reeves*, 530 U.S. at 148.

To show pretext, Owens contends that (1) Excel's proffered reason for eliminating her position is different than the reason she was given at the time of her termination; (2) Excel's statements and actions are inconsistent with its financial condition; and (3) Excel's actions with respect to

retention, hiring and compensation of employees before and after the RIF are inconsistent. Specifically, Owens avers that Lavey told her at the time of her termination that her position was being eliminated because of the VarTec acquisition. Owens offers Lavey's deposition, in which he denies such an assertion and concedes that such an assertion would be false. Further, Owens provides deposition testimony of Lavey and Timmer in which they contradict each other regarding the discussions leading up to the RIF.[8]

Excel counters that summary judgment is appropriate because its proffered reason is the same reason Owens was given on the day of her termination, namely, that her position was no longer needed, and it is undisputed that Owens was terminated pursuant to a company-wide RIF. The court agrees. Even assuming that Lavey told her that her position was being eliminated because of the VarTec acquisition and that Lavey and Timmer have different recollections of the discussions they had regarding the RIF, the record conclusively reveals a nondiscriminatory reason for Owens's termination, namely, the company-wide RIF.

Owens next attempts to show pretext by questioning the necessity of the RIF based on Excel's financial condition at that time and various personnel and compensation decisions made before and after the RIF. Specifically, she points to two internal documents issued shortly before the October RIF that state that Excel was on target to meet its business goals. Based on this evidence, Owens contends that "the evidence clearly shows that the RIF was not expected to solve [Excel's financial] problems." In this same vein, Owens points out that, even after the RIF, Excel continued to hire employees[9]

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[8] The inconsistent testimony deals with the information allegedly given by Timmer to his direct reports, including Lavey, regarding the objective of the RIF and the directive to reduce costs; it does not deal specifically with the decision to eliminate Owens's position.

[9] It is undisputed that none of these employees replaced Owens.

and pay bonuses. Assuming that the RIF was an unwise and unnecessary business decision, a court cannot and will not second-guess a company's decision to undergo a RIF. *See Walton v. Bisco Indus., Inc.*, 119 F.3d 368, 372 (5th Cir. 1997); *Nieto v. L&H Packing Co.*, 108 F.3d 621, 624 (5th Cir. 1997).

Finally, Owens compares her treatment to that of Brandgard and Prestwood, both of whom are younger than she. Specifically, she questions why Brandgard and Prestwood, whose combined salaries were over $310,000, were not terminated, as their positions had been initially identified for elimination. She contends that if cost reduction were the true reason behind the RIF, the elimination of their positions would have saved more money than the elimination of her position. Owens further contends that her performance was superior to that of Brandgard, as Brandgard overstated Excel's revenue in 2000 by $136 million while she (Owens) brought in an additional $35 million in the same time period. Even if the terminations of Brandgard and Prestwood would have saved Excel more money and if her performance was superior to that of Brandgard, Owens has not produced any evidence to dispute Lavey' s reason for choosing to eliminate her position, namely, that he could cut costs while using the existing staff to maintain the same level of work. Indeed, it is undisputed that there was little to no disruption in the work performed within the tax department after Owens's termination. Furthermore, Owens has not disputed Lavey's reason for not eliminating Brandgard's position, namely, she was working on a project that needed to be completed before the position could be eliminated. Lastly, there is no evidence to suggest that Lavey had the authority to eliminate Prestwood's position, as they were both Vice Presidents of Excel. Thus, Owens has not presented sufficient evidence to create a genuine issue of material fact as to pretext. Accordingly, there is no genuine issue of material fact as to Owens's age discrimination claims based on her termination, and Excel is entitled to judgment as a matter of law as to those claims.

2. Failure to Hire

Owens contends that VarTec discriminated against her on the basis of race, sex, and age when it failed to hire her for the position of Director of Tax. VarTec counters that she was not hired for the position because she was not qualified.

In a failure to hire case, a *prima facie* case is established by showing that (1) Owens is a member of a protected class; (2) she applied for a position; (3) she was qualified for the position for which she applied; (4) she was not selected for the position; and (5) after VarTec declined to hire her, the position either remained open or someone outside the protected group was selected to fill it. *See Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1087 (5th Cir. 1994) (citing *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1135 (5th Cir.1983)).[10]

(a) *Prima Facie Case*

VarTec contends that Owens cannot establish that she was qualified for the Director of Tax position, as she was not a Certified Public Accountant ("CPA"). Specifically, VarTec's job description of the position at issue lists a CPA license as a requirement, and the individual, Keeter, who was selected for the position is a CPA. Owens concedes that she does not have a CPA license but counters that a genuine fact question exists as to whether she was qualified for the position because (1) two VarTec employees involved in the hiring process believed she was qualified; (2) she was granted an interview by a VarTec recruiter, which ordinarily does not happen unless the individual is qualified for the position; (3) the individual who held the position prior to the vacancy was not a CPA; and (4) she was never informed during the hiring process that she was not qualified.

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[10] The court will again analyze all of Owens's discrimination claims together. *See* n.5, *supra*.

VarTec does not contend that Owens "was not capable of performing the essential functions of the job." It contends that she did not meet the "facial requirements" of the job description for the position. The court therefore determines that VarTec's concession that Owens was capable of performing the essential functions of the job is sufficient to establish that she was qualified for the position. *See Smith v. Eastern Airlines, Inc.*, 651 F.Supp. 214, 219 n.1 (S.D.Tex. 1986) ("Here the term 'qualified' simply means an essential ability to perform the job, not that Plaintiff met the job description required by the employer.").

VarTec next contends that Owens cannot establish that she was rejected for the position because it did not make an affirmative decision not to hire her but rather it made an affirmative decision to hire Keeter. VarTec's contention is a "difference without a distinction." The fourth element of *a prima facie* case, as articulated earlier, requires a showing that Owens was not selected ' for the position. As Keeter was given the position, it is clear that Owens was not selected for the position. The court therefore concludes that Owens has met her initial burden of establishing the elements of *a prima facie* case.

(b) Legitimate, Nondiscriminatory Reason

VarTec contends that Egger, the ultimate decisionmaker, hired Keeter because of "his previous, positive work history with Keeter, Keeter's VarTec-specific experience, Keeter's "Big 5" accounting experience, and Keeter's otherwise exemplary qualifications and experience." VarTec Am. Reply at 4. Owens counters that VarTec has not articulated a legitimate reason for not selecting her, as it never compared her qualifications to those of Keeter's. VarTec concedes that no comparison was done because "Keeter was not selected over Owens." VarTec Am. Reply at 5. Instead, the decision to hire Keeter, VarTec continues, was made before Owens could

be considered for the position. Although it appears that Owens was not considered for the position, the court determines that VarTec has articulated legitimate, nondiscriminatory reasons for hiring Keeter. *Cf. Wheeler v. City of Columbus,* 686 F.2d 1144, 1153-54 (5th Cir. 1982) (court analyzed employer's refusal to interview the plaintiff thus barring her from consideration in the pretext stage of the burden-shifting framework). The burden now shifts back to Owens to demonstrate that VarTec's articulated reasons are a pretext for intentional discrimination.

(c) Pretext and Intentional Discrimination

Owens contends that VarTec's proffered reasons are pretext because she was never considered for the position and she is more qualified than Keeter for the position. VarTec counters that Owens was not considered for the position because Egger "was focused on the possibility of hiring Keeter." VarTec Am. Br. at 11. Owens contends that VarTec's explanation is disingenuous, as she applied for the position before Keeter. Although this may be unfair, it alone is insufficient to establish that VarTec's failure to hire her is based on impermissible discrimination. Indeed, it is undisputed that at the time the decision to hire Keeter was made, Egger was unaware of Owens's race or age.

VarTec further contends that it is entitled to summary judgment because Owens fails to establish that no reasonable person would have chosen Keeter over her for the position in question. The court agrees. At the time of his hire, Keeter had over 15 years of public accounting experience, including over 10 years in a manager or senior manager capacity; he has a B.B.A. in accounting; he is a CPA; he had 14 years of "Big 5" experience; and he had VarTec-specific telecom experience. On the other hand, Owens had over 30 years experience in corporate taxation, including 20 years in a supervisory position; she has a B.S. in accounting and an

M.S. in taxation; she had seven years of experience in corporate tax in the telecom industry and worked in a regulated environment for 11 years; and she was the Director of Tax at Excel for over six and a half years. Obviously, both Keeter and Owens are well-qualified for the position at issue. The disparities in their qualifications are not of "such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen" Keeter over Owens for the position. *See Deines v. Texas Dep't of Protective and Regulatory Servs.*, 164 F.3d 277, 280-81 (5th Cir. 1999).

The court determines that Owens has failed to establish that VarTec's articulated reasons for its alleged discriminatory conduct were a pretext for intentional discrimination. Accordingly, VarTec is entitled to judgment on Owens's claims of race, age, and sex discrimination.

3. Aiding and Abetting

In her Second Amended Complaint, Owens alleges violations of § 21.056 of the Texas Labor Code. Section 21.056 provides that "[a]n employer . . . commits an unlawful employment practice if the employer . . . aids, abets, incites, or coerces a person to engage in a discriminatory practice." Tex. Labor Code Ann. § 21.056 (Vernon 1996). Excel and VarTec move for summary judgment on the basis that the record is devoid of any evidence to support a violation of § 21.056. The court agrees. Moreover, Owens does not oppose summary judgment on her § 21.056 claims. *See Pl. Am.* Br. at 2 ("Owens had also alleged that Excel and VarTec aided and abetted each other in violation of Tex. Labor Code § 21.056; however, Owens is not opposing summary judgment on the aiding and abetting claims."). Accordingly, Excel and VarTec are entitled to judgment as a matter of law on Owens's § 21.056 claims.

C. Retaliation

Owens brings a retaliation claim pursuant to Title VII, THCRA, ADEA, and § 1981 against VarTec.[11] Specifically, Owens contends that VarTec retaliated against her by failing to hire her for the Director of Tax position because she had previously complained to Excel regarding sex, race, and age discrimination. VarTec counters that Owens cannot establish *a prima facie* case or show that "but for" her protected activity, she would have been hired for the Director of Tax position.

The *McDonnell Douglas* burden-shifting framework is also applicable to retaliation claims. *Montemayor v. City of San Antonio*, 276 F.3d 687, 692 (5th Cir. 2001). To establish a *prima facie* case of retaliation, a plaintiff must demonstrate that: (1) she engaged in a protected activity; (2) she experienced an adverse employment action following the protected activity; and (3) a causal link existed between the protected activity and the adverse employment action. *Id.; Mota v. University of Texas Houston Health Sci. Ctr.*, 261 F.3d 512, 519 (5th Cir. 2001). The burden of production then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action. *Id.* Once the defendant does so, the inference of discrimination created by the *prima facie* case disappears, and the ultimate question becomes whether the protected conduct was the "but for" cause of the adverse employment action.[12] *Id.*

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[11] As the underlying facts of Owens's Title VII, § 1981, TCHRA, and ADEA retaliation claims are the same, and the evidentiary burdens of these statutes are similar, her claims will be analyzed together. *See* n.5, *supra*.

[12] Owens contends that the less stringent "motivating factor" test applies to her THCRA claim. She relies on *Quantum Chemical Corp. v. Toennies*, 47 S.W.3d 473 (Tex. 2001); her reliance *on Toennies is* misplaced. In *Pineda v. United Parcel Serv., Inc.*, 353 F.3d 414 (5th Cir. 2003), the Fifth Circuit rejected this argument. Specifically, the *Pineda* court noted that the *Toennies* court "meant that the [motivating factor] standard was the

At issue here is the third element of the *prima facie* case—the existence of a causal connection between the protected activity and the adverse employment action. VarTec contends that Owens cannot establish a causal connection because Egger, the ultimate decisionmaker, had no knowledge of her complaints of discrimination when he made his decision to hire Keeter. Owens contends that she need only establish general corporate knowledge of her protected activity, not specific knowledge by an individual employee of VarTec. She relies on *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111 (2d Cir. 2000). Owens's reliance on *Gordon* is misplaced.

First, *Gordon* is not binding on this court, as it was decided in another circuit. Second, the holding in *Gordon* actually supports VarTec's position that the lack of knowledge on the part of Egger is evidence of a lack of a causal connection. Specifically, the *Gordon* court held, among other things, that "[t]he lack of knowledge on the part ofparticular *individual agents* is admissible as some evidence of a lack of causal connection, countering plaintiff's circumstantial evidence of proximity or disparate treatment." *Id.* at 117 (emphasis in original).[13]

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applicable standard in both pretext and mixed motive employment discrimination cases where § 21.125(a) *was applicable." Id.* at 419 n.4 (emphasis added). The *Pineda* court then held that the "but for" standard is the correct standard for claims brought under § 21.055, as § 21.125(a), by its own terms, is not applicable to claims brought under § 21.055. *Id.* at 419. The court, therefore, applies the "but for" standard to Owens's THCRA claim.

[13] The *Gordon* court noted, however, that even in the absence of direct knowledge by individual agents, a jury can still find retaliation if, for example, it finds that "circumstances evidence knowledge of the protected activities or the jury concludes that an agent is acting explicitly or implicit upon the orders of a superior who has the requisite knowledge." 232 F.3d at 117. No such evidence has been presented in this case.

Owens further contends that the timing of Keeter's hire is sufficient to establish a causal connection. Specifically, VarTec was notified of Owens's complaint on January 16, 2002, the same day that it sent Keeter a written offer of employment. Owens is correct that temporal proximity between the protected activity and the adverse employment action may be a significant factor in showing a causal connection. *See Evans v. City of Houston*, 246 F.3d 344, 356 (5th Cir. 2001). She must still, however, demonstrate that the decision not to hire her was based in part on knowledge of her complaints of discrimination. *See Medina v. Ramsey Steel Co.*, 238 F.3d 674, 684 (5th Cir. 2001) (citing *Sherrod v. American Airlines*, 132 F.3d 1112, 1122 (5th Cir. 1998)). "If the decisionmakers were completely unaware of the plaintiff's protected activity, then it could not be said (even as an initial matter) that the decisionmakers might have been retaliating against the plaintiff for having engaged in that activity." *Manning v. Chevron Chemical Co.*, 332 F.3d 874, 884 n.6 (5th Cir. 2003).

Here, it is undisputed that Eggers did not know of Owens's protected activity when he interviewed Keeter and that Eggers had decided as early as December 13, 2001 that he wanted to hire Keeter for the vacant position. Indeed, the hiring requisition form for the position in question, dated January 8, 2002, identifies Keeter and sets forth his salary requirements. Owens has not adduced any evidence that any VarTec decisionmaker had knowledge of her protected activity when she was not selected for the vacant position. As such, Owens has not established *a prima facie* case of retaliation.[14]

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[14] Even assuming Owens established *a prima facie* case of retaliation, VarTec provided a legitimate, nonretaliatory reason for not hiring her for the Director of Tax position, namely, the decision to hire Keeter was made before she could be considered for the position. *See* § M.B.2, *supra.* Owens has not offered sufficient evidence to demonstrate that the reason she was not hired was in retaliation for complaining to Excel regarding discrimination.

IV. Conclusion

For the above stated reasons, no genuine issues of material fact exist with respect to any of Owens's claims, and Defendants are entitled to summary judgment on these claims. Accordingly, the court grants Defendant Excel Management Services, Inc.'s Motion for Summary Judgment; and grants Defendant VarTec Telecom, Inc.'s Motion for Summary Judgment. The court dismisses with prejudice this action against Defendants. Judgment will issue by separate document as required by Fed. R. Civ. P. 58.

It is so ordered this 13th day of February, 2004.

/s/ Sam A. Lindsay
SAM A. LINDSAY
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
D. MINNESOTA

No. CIV.02-1014 JRT/FLN

DENNIS ORDAHL,

Plaintiff,

v.

FORWARD TECHNOLOGY INDUSTRIES, INC.,

Defendant.

Feb. 4, 2004.

MEMORANDUM OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TUNHEIM, *District J.*

Plaintiff Dennis Ordahl ("Ordahl") was employed by defendant Forward Technology Industries, Inc. ("FTI") as a machinist until his employment was terminated in August 2000. Ordahl claims that he was unlawfully terminated by FTI in violation of the Americans with Disabilities Act (the "ADA") and the Minnesota Human Rights Act ("MHRA"). FTI asserts that Ordahl is not disabled and was never regarded or treated as disabled as that term is defined in the ADA. FTI further argues that Ordahl's employment was terminated for legitimate reasons and that even if Ordahl had remained employed at FTI, his employment would necessarily have been terminated on May 31, 2000 when the Plymouth facility where Ordahl worked was closed. They therefore request that any potential damages be limited accordingly.

I. BACKGROUND

At age 15 Ordahl suffered an accident that severed his vena cava vein and resulted in the amputation of his left hand and part of his arm. As a result of these injuries, Ordahl uses a prosthetic hand and suffers from a circulatory condition known as venous stasis disease.[1] Both conditions are permanent. According to Ordahl, his amputation affects his ability to bathe, dress, eat, grasp, and perform actions requiring manual dexterity, participate in recreational activities such as sports, and engage in physical touching and sexual activity. Ordahl's circulatory condition affects his ability to walk, stand, sit, and participate in recreational activities.

Ordahl was first employed by FTI in 1979 as a machinist, at which time Ordahl informed FTI of his impairments. According to Ordahl, during his tenure at FTI he worked on a variety of machines performing all of the main machining functions, and at the time of his dismissal was capable of operating any machine in the workshop. In 1998, FTI began purchasing new, more sophisticated machines that required less manual operation and more computer programming skill. According to Ordahl, he repeatedly requested computer training on the new machines, particularly the 'Tacumi,' but was turned down by management. According to Ordahl and a former FTI manager, the management did not think that Ordahl was a good candidate to operate the new machines because he did not have two hands. Eventually, shortly before

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[1] The inferior vena cava vein is the largest vein in the human body, and returns blood to the right atrium of the heart from the lower body parts. 6 J.E. Schmidt, *Attorneys' Dictionary of Medicine and Word Finder* V-52 (2002). Venous stasis is a circulatory condition causing stagnation of blood in the veins. *Id.* at V-71.

he was terminated, management offered Ordahl part time computer related training.[2]

In 2000, FTI was sold to new owners who instituted a number of cost-cutting measures including extensive layoffs, closure of the Plymouth facility that Ordahl worked at, and outsourcing of various kinds of work. According to FTI, Ordahl's department, the machining department, had three product lines. With the close of the Plymouth facility, two of the product lines, cleaning and ultrasonic, were either outsourced or eliminated, and the relevant employees terminated. The remaining line, plastic welding, moved to a new facility in Cokato.

FTI terminated Ordahl's employment on August 8, 2000, allegedly for violating a company policy against working on personal projects at work while still on the clock. Ordahl denies having violated the policy, and asserts that his termination was improperly motivated by his disability.

II. ANALYSIS

A. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

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[2] Specifically, Ordahl received 30 minutes of CAD/CAM training from a fellow employee each day for several weeks. It appears from the record that this training would have been useful in operating existing machines and might also have been one step towards operating the new machines. However, more training would have been required in order for Ordahl to operate the new machines. After several weeks, workload at the company increased to a point where neither Ordahl nor the trainer-employee could afford to spend 30 minutes on training.

Fed.R.Civ.P. 56. Only disputes over facts that might affect the outcome of the suit under the governing substantive law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment is not appropriate if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id*. Summary judgment is to be granted only where the evidence is such that no reasonable jury could return a verdict for the nonmoving party. *Id.*

The moving party bears the burden of bringing forward sufficient evidence to establish that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmoving party is entitled to the benefit of all reasonable inferences to be drawn from the underlying facts in the record. *Vette Co. v. Aetna Casualty & Surety Co.*, 612 F.2d 1076, 1077 (8th Cir.1980). However, the nonmoving party may not merely rest upon allegations or denials in its pleadings, but it must set forth specific facts by affidavits or otherwise showing that there is a genuine issue for trial. *Forrest v. Kraft Foods, Inc.*, 285 F.3d 688, 691 (8th Cir.2002).

B. ADA

The ADA prohibits employers from discriminating against any "qualified individual with a disability" because of that disability. 42 U.S.C. § 12112(a). Where, as here, a plaintiff alleges discriminatory disparate treatment,[3] the Court applies the familiar burden-shifting framework first articulated in

[3] In the complaint, Ordahl alleges disparate treatment, refusal to accommodate, retaliation, and improper termination. The record and the arguments of the parties, however, make clear that this case focuses on disparate treatment.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Fenney v. Dakota, Minnesota & Eastern Railroad Co.*, 327 F.3d 707, 711-12 (8th Cir.2003). Under this framework, the plaintiff initially bears the burden of establishing each element of the prima facie case. *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1134 (8th Cir.1999) (en banc). The second step of the analysis requires the employer to "rebut the presumption of discrimination by articulating a legitimate, non-discriminatory reason for the adverse employment action." *Id.* at 1135. The third step traditionally "shifts [the burden] back to the plaintiff to demonstrate that the employer's non-discriminatory reason is pretextual." *Id.*

In *Desert Palace, Inc. v. Costa,* the Supreme Court analyzed 42 U.S.C. § 2000e-2(m), part of the 1991 Civil Rights Act, and concluded that a Title VII plaintiff need not present direct evidence of discrimination in order to either obtain a mixed-motive jury instruction or to establish liability in a mixed motive case. 539 U.S. 90, ___ - ___, 123 S.Ct. 2148, 2154-55, 156 L.Ed.2d 84 (2003). As this Court noted in *Brown v. Westaff (USA), Inc.*, 2004 WL 67654 (D.Minn.2004), courts have attempted to discern the potential broader impact of *Desert Palace,* and have come to multiple conclusions. Some courts have persuasively reasoned that *Desert Palace* requires that the *McDonnell Douglas* framework be dropped in favor of the more straightforward process laid out in § 2000e-2(m). *See, e.g., Dare v. Wal-Mart Stores, Inc.*, 267 F.Supp.2d 987, 990-93 (D.Minn.2003). Noting that multiple federal anti- discrimination laws are patterned after Title VII and are evaluated similarly, this reasoning has been extended to other contexts, including the ADA. *LeClair v. Wells Fargo Bank Iowa, N.A.*, 291 F.Supp.2d 873, 879-80 (S.D.Iowa 2003) (following *Skomsky v. Speedway SuperAmerica, L.L.C.*, 267 F.Supp.2d 995, 998-1000 (D.Minn.2003)).

Other courts have determined that *Desert Palace* requires that *McDonnell Douglas* be modified, but not abandoned completely. *See Brown v. Westaff,* 2004 WL 67654, at *4-5; *Dunbar v. Pepsi-Cola General Bottlers of Iowa, Inc.*, 2003 WL 22290229, *13-15 (N.D.Iowa 2003); *see also Rishel v. Nationwide Mut. Ins. Co.*, 2003 WL 23112666. *8-9 (M.D.N.C.2003) (following *Dunbar* in ADA context).

The Eighth Circuit has declined to reach the issue of whether *Desert Palace* alters the *McDonnell Douglas* burden-shifting analysis and continues to apply *McDonnell Douglas. See Allen v. City of Pocahontas*, 340 F.3d 551, 558 n. 5 (8th Cir.2003) ("Without reaching the issue as to whether the Supreme Court's refocus on the statutory language of the Civil Rights Act of 1991 alters the burden-shifting analysis of *McDonnell Douglas,* the result in this case remains the same."); *see also Raytheon Co. v. Hernandez*, ___ U.S. ___, 124 S.Ct. 513, ___ L.Ed.2d ___ (2003) (noting that *McDonnell Douglas* is properly applied to disparate treatment cases under the ADA); *Peebles v. Potter*, 354 F.3d 761, 2004 WL 35070 (8th Cir.2004) (same).

As explained more fully in *Brown v. Westaff,* this Court believes that *Desert Palace* necessitates modifying the third step of the *McDonnell Douglas* framework "so that it is framed in terms of whether the plaintiff can meet his or her ultimate burden to prove intentional discrimination, rather than in terms of whether the plaintiff can prove pretext." 2004 WL 67654, * 4-5 (quoting *Dunbar*, 2003 WL 22290229, at *15). In other words, in order to survive summary judgment under the *McDonnell Douglas* analysis, a plaintiff is no longer limited to demonstrating pretext, i.e. that the defendant's asserted reason was false. Rather, at step three, a plaintiff need only present sufficient evidence, of any type, for a jury to conclude that the plaintiff's disability was a

"motivating factor" for the employment action, even though the defendant's legitimate reason may also be true or have played some role.

1. Ordahl's prima facie case

To establish a prima facie case of discrimination under the ADA, a plaintiff must show (1) that he has a disability within the meaning of the ADA, (2) that he is qualified to perform the essential functions of his job, with or without reasonable accommodation, and (3) that he suffered an adverse employment action because of his disability. *Kiel*, 169 F.3d at 1135. FTI does not appear to dispute that Ordahl is qualified, or that he suffered an adverse employment action, namely termination. Thus, the key inquiry is whether Ordahl is disabled as that term is defined under the ADA.

The ADA offers several definitions of "disability," including "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual . . ."[4] 42 U.S.C. § 12102(2)(A). FTI does not dispute that Ordahl's amputation and circulatory disease qualify as physical impairments. *See* 29 C.F.R. § 1630.2(h). However,

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[4] The ADA fully defines a "disability" as either:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (1994). Ordahl also asserts that he meets subparts (B) and (C). Because the Court finds that Ordahl raises a question of material fact as to whether he is disabled under subsection (A), the Court does not address this contention. However, the Court notes that the evidence in the record indicating that Ordahl, despite his experience and positive work evaluations, was not, at least initially, considered a candidate to operate the new machines purchased by FTI appears sufficient to create a question of material fact as to whether FTI regarded Ordahl as impaired and to raise an inference of discriminatory treatment.

FTI strongly disputes whether those impairments substantially limit any of Ordahl's major life activities.

Caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning, and working all qualify as major life activities. 45 C.F.R. § 84.3(j)(2)(ii); *see also Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 195, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002); *Fenney*, 327 F.3d at 714. Sitting, standing, lifting, and reaching have also been found to be major life activities. *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 948 (8th Cir.1999). Ordahl alleges that his impairments affect, among other things, his ability to care for himself, perform manual tasks, walk, sit, and stand.

An individual is "substantially limited" by his impairment if the impairment "prevents or severely restricts" his ability to accomplish a major life activity, as compared to the way in which unimpaired individuals normally accomplish the same major life activity.[5] *Fenney*, 327 F.3d at 714- 15 (quoting *Toyota,* 534 U.S. at 198). Ordahl testified in deposition and stated in his affidavit that the activities of dressing, bathing, and carrying plates and glasses are substantially more difficult with his amputated hand/prosthesis than those activities were prior to the amputation. According to Ordahl, dressing himself takes twice as long as it would an unimpaired person. Ordahl also testified that his circulatory condition prevents him from either sitting or standing still for very long. The condition periodically causes ulcerated sores on his legs that make walking difficult and painful.

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[5] This standard applies to all major life activities except the major life activity of working, which requires a separate analysis. *Fenney*, 327 F.3d at 715, n. 15 (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999)). Ordahl does not allege that he is substantially restricted in his ability to work.

Additionally, the need to care for the sores on his legs and attendant pain lengthens the amount of time it takes him to care for himself in the morning.

FTI has presented substantial evidence of the degree to which Ordahl has managed to overcome and compensate for his impairments. He has maintained a full-time job for many years, has friends and a family, and leads what is, in many ways, a 'normal' life. FTI asserts that all of this evidence indicates that Ordahl cannot be considered disabled under the ADA.

The Court disagrees. The ADA does not require that a plaintiff demonstrate total inability to perform daily activities in order to be considered disabled. Rather, the central inquiry is whether, when compared to the activities of a non-impaired person, the plaintiff is substantially restricted in his ability to perform those same activities.

The Eighth Circuit's recent opinion in *Fenney* is instructive. In *Fenney,* the Eighth Circuit determined that a plaintiff with a damaged hand and arm who presented evidence that it took him twice as long to perform "taking care of himself tasks" such as bathing, shaving, preparing a meal, dressing, and going to the restroom had presented sufficient, albeit thin, evidence "that his impairment severely restricted his ability to care for himself compared with how an unimpaired individual would normally care for himself or herself in daily life." 327 F.3d at 715-16. The court noted that the defendant had failed to offer contradicting evidence and found that Fenney's evidence, viewed in the light most favorable to him, created a reasonable inference from which an issue of material fact could be drawn concerning the extent to which his impairment limited his ability to care for himself. *Id.*

FTI argues that this case is distinguishable from *Fenney* because it, unlike the *Fenney* defendant, has presented evidence contradicting Ordahl's claims of disability. Its argu-

ment is inapposite. None of the evidence presented by FTI necessarily contradicts Ordahl's statements concerning the difficulty with which he carries out his major life activities. That Ordahl, through sheer force of will, learned accommodations, and careful planning, is able to perform a wide variety of activities despite his physical impairments does not mean that those activities are not substantially more difficult for him that they would be for an unimpaired individual. The Court therefore finds that Ordahl has successfully made out a prima facie case of discrimination under the ADA.

2. FTI's legitimate reason

In order to meet its burden, "[t]he defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Center*, 509 U.S. 502, 507, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) (internal quotation marks and citation omitted). FTI asserts, and has presented evidence, that Ordahl was dismissed for working on a personal project, at work, while still on the clock, without permission. According to FTI, this is against company policy. The Court is satisfied that FTI has met its burden of presenting a facially non-discriminatory reason for Ordahl's termination.

3. Ordahl's ultimate burden

In this final stage, Ordahl must present sufficient evidence that a reasonable jury could conclude that his disability was a motivating factor in his termination. One means of doing so would be to prove that the defendant's asserted legitimate reason for the action was false, or merely a pretext. Thus, evidence sufficient to demonstrate pretext under the traditional *McDonnell Douglas* analysis, will also be sufficient

under the modified version, even where evidence indicates that the defendant's asserted legitimate reason is at least partly true.

Evidence relevant to a finding of pretext might include that similarly situated unimpaired employees were treated differently, the employer's treatment of the employee during his employment, or the employer's general policy and practice regarding disabled employees. *McDonnell Douglas*, 411 U.S. at 804.

As discussed above, Ordahl has provided evidence that working on personal projects at work was common among the machinists, but no unimpaired employee had been terminated, or even disciplined, for doing so. Additionally, Ordahl has presented testimony that FTI managers considered his prosthesis an impediment to operating new machinery acquired by the company. Taking this evidence in the light most favorable to the plaintiff, as the Court must, Ordahl has presented evidence sufficient to create a triable question as to whether the reasons presented by FTI for his termination were a pretext for an unlawful discriminatory action, and to permit a reasonable jury to conclude that Ordahl's disability was a motivating factor in his termination by FTI. The Court therefore denies FTI's motion for summary judgment on the ADA claim.

C. MHRA

The MHRA largely parallels the ADA, *Maziarka v. Mills Fleet Farm, Inc.* 245 F.3d 675, 678 n. 3 (8th Cir.2001), with one exception. Under the MHRA, a person is considered disabled if he "(1) has a physical, sensory, or mental impairment which *materially* limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment." Minn.Stat. § 363A.03, subd. 12 (emphasis added). A "material" limitation is different from and less stringent than the "sub-

stantial" limitation required by the ADA. *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 543 (Minn.2001) (citing *Sigurdson v. Carl Bolander & Sons, Co.*, 532 N.W.2d 225, 228 & n. 3 (Minn.1995)). In light of the above conclusion that Ordahl has met the more stringent federal standard, the Court also finds that Ordahl has met his burden with respect to his MHRA claim and that summary judgment is therefore inappropriate.

D. Damages

A prevailing claimant under the ADA is presumptively entitled to compensatory damages in the form of back pay that would have accrued from the termination date to the entry of judgment. 42 U.S.C.A. §§ 12101 *et seq; see also Forshee v. Waterloo Industries, Inc.*, 178 F.3d 527, 530-31 (8th Cir.1999). A prevailing claimant may also be entitled to equitable relief, including front pay, designed to address the claimant's equitable needs, "including the ability to obtain employment with comparable compensation and responsibility." *Ollie v. Titan Tire Corp.*, 336 F.3d 680, 687 (8th Cir.2003).

FTI contends that it had eliminated most positions at its Plymouth facility including Ordahl's former position and, indeed, his entire department by May 31, 2002. FTI asserts that Ordahl could not have been employed by FTI after that date and therefore is not, as a matter of law, entitled to back pay following that date or to any front pay. Ordahl responds that as of August 15, 2002, FTI still had thirteen employees in the machining, tooling, and ultrasonic areas, albeit in Cokato.[6] Ordahl testified that he was capable of working in any of those areas. In light of Ordahl's more than twenty-year history at FTI, and the evidence that some jobs apparently fitting Ordahl's skills were transferred to Cokato but not

[6] Cokato is approximately 40 miles from Plymouth.

eliminated, the Court cannot find as a matter of law that had Ordahl remained employed by FTI he would not have been one of the experienced, senior employees asked to move from the Plymouth facility to the new Cokato facility. *See Forshee*, 178 F.3d at 530-31 (finding that damages for time period after termination of all temporary employees was adequately supported by speculative theory that temporary employee might have been hired as full-time employee). Without more conclusive evidence to the contrary, the Court finds that Ordahl has established a genuine issue of material fact as to whether he actually would have been terminated on May 31, 2002, precluding summary judgment limiting any possible damage award.

ORDER

Based on the foregoing, all the records, files, and proceedings herein, IT IS HEREBY ORDERED that defendant's motion for summary judgment [Docket No. 18] is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
N.D. TEXAS, DALLAS DIVISION

No. Civ.A.3:02-CV-1591-L

NIXON WINTER,

Plaintiff,

v.

BANK OF AMERICA, N.A.,

Defendant.

Dec. 12, 2003

ORDER

LINDSAY, *J*.

Before the court are Defendant Bank of America, N.A.'s Motion for Summary Judgment, filed May 28, 2003; and Plaintiff's Motion for Partial Summary Judgment on Liability, filed September 19, 2003. After careful consideration of the motions, responses, replies, summary judgment evidence, record and applicable law, the court grants in part and denies in part Defendant Bank of America, N.A.'s Motion for Summary Judgment; and denies Plaintiff's Motion for Partial Summary Judgment on Liability.

I. *Factual and Procedural Background*

This is an employment discrimination and retaliation case. Plaintiff Nixon Winter ("Plaintiff" or "Winter") is a black male of Nigerian national origin. Winter was employed by Defendant Bank of America, N.A. ("Defendant," "Bank of America," or "the Bank") from April 1997 until October 29, 2001. During his employment with Bank of America, Winter

was promoted to the position of banking center manager in January 1999 and to the position of assistant vice president in November 1999.

In March 2000, Winter applied for a position as a client manager in the Bank's Premier Banking group ("Premier Banking"). At that time, there were five openings for the position of client manager. Premier Banking provides high level service to customers with substantial financial relationships with the Bank or to customers who could potentially develop such relationships in the near future. Client managers were expected to develop one-on-one relationships with their customers to make banking easy and convenient and to understand their customers' financial goals and advise them of the appropriate resources and financial services offered by the Bank.

Christine Singh ("Singh"), a senior vice president who was the market manager for South Dallas Premier Banking, interviewed Winter for a client manager position. Although Singh was impressed with Winter in terms of his ability to produce results, she had some other concerns. Specifically, she received negative feedback regarding Winter's interpersonal skills from a co-worker. Additionally, Winter's manager expressed concern regarding his ability to build client relationships over the telephone because his accent might make it difficult for some customers to understand him; nonetheless, Singh wanted to offer Winter the position. Before doing so, however, she arranged for her manager and a few other executives to interview Winter so that they could provide their opinion of him. Singh ultimately decided to promote Winter.[1]

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[1] Apparently, Winter was promoted to the client manager position later in March 2000. The record, however, does not reflect the exact date of the promotion.

On July 9, 2001, Singh met with Winter to address several customer complaints that had been filed against him. In response, Winter questioned the authenticity and the veracity of the complaints. Four days later, on July 13, 2001, Winter submitted a written complaint against Singh to the personnel supervisor, Mary Kanaga ("Kanaga") in which he claimed a hostile work environment. On July 16, 2001, Singh provided Winter with an updated coaching memorandum in which she explained the need to improve his customer satisfaction rating and warned that a failure to do so could result in termination. On October 24, 2001, Winter, Singh and a new personnel supervisor Rich Jiwanlal ("Jiwanlal")[2] met for a formal coaching session and final warning. Winter became upset during this meeting. Five days later, on October 29, 2001, Singh discharged Winter.

On November 19, 2001, Winter filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"), contending race and national origin discrimination and retaliation. He received a right-to-sue letter from the EEOC on May 30, 2002. On July 26, 2002, Winter filed suit, contending violations of Title VII of the Civil Rights Act of 1964 ("Title VII") and 42 U.S.C. § 1981. Specifically, Winter contends that Bank of America discriminated against him on the basis of his race and national origin when he was discharged. Winter also contends that his discharge was in retaliation for his discrimination complaints against Singh. Bank of America has filed for summary judgment, and Winter has filed for partial summary judgment on liability.

II. *Summary Judgment Standard*

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on

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[2] Sometime after Winter filed his complaint against Singh but before the October 24, 2001 meeting, Jiwanlal replaced Kanaga.

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir.1998). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Ragas*, 136 F.3d at 458. Further, a court "may not make credibility determinations or weigh the evidence" in ruling on motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *Anderson*, 477 U.S. at 254-55.

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 586. Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir.1996). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *See Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, 513 U.S. 871, 115 S.Ct. 195, 130 L.Ed.2d 127 (1994). The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Ragas*, 136 F.3d at 458. Rule 56 does not impose a

duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.; see also Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n. 7 (5th Cir.), *cert. denied,* 506 U.S. 832, 113 S.Ct. 98, 121 L.Ed.2d 59 (1992). "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Disputed fact issues which are "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion. *Id.* If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322-23.

III. *Analysis*

A. Defendant's Motion for Summary Judgment

1. Applicable Standard of Proof

Winter and Bank of America disagree regarding the applicable standard of proof on Winter's discrimination claims. Winter maintains that the court should apply the "mixed-motives" analysis found in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 2150, 156 L.Ed.2d 84 (2003).[3] A "mixed- motives" case is one in which the adverse employment decision is motivated by both legitimate *and* illegitimate, that is, discriminatory, reasons. *Waltman v. International Paper Co.*, 875 F.2d 468, 481 (5th Cir.1989).

Bank of America counters that this is a pretext case, and therefore the court should follow the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668

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[3] *Desert Palace* makes clear that direct evidence of discrimination is not necessary to obtain a mixed-motive jury instruction under Title VII. 539 U.S. at ___, ___, 123 S.Ct. at 2150, 2155.

(1973), burden-shifting framework. A pretext case is one in which the "employer has either a discriminatory *or* a non-discriminatory rationale for its actions." *Waltman*, 875 F.2d at 481. (emphasis in original).

As an initial matter the court declines to accept Winter's suggestion that the *McDonnell Douglas* burden-shifting paradigm no longer exists after *Desert Palace.* This would not be an evolution but a revolution in employment discrimination law. If the Supreme Court were going to make a draconian departure from 30 years of well-established employment discrimination precedent, it would have done so with unmistakable clarity. In *Desert Palace,* the Supreme Court does not even intimate that it is overruling, restricting or clarifying *McDonnell Douglas.* Moreover, no Fifth Circuit authority embraces Winter's interpretation of *Desert Palace. See Read v. BT Alex Brown Inc.*, 72 Fed. Appx. 112 (5th Cir.2003).[4]

The court must now determine which analysis applies here. *See Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1217 (5th Cir.1995) (A case need not be labeled as a "mixed motives" case or pretext case from its inception; but at some point, the court must determine whether the case involves mixed motives.). Bank of America contends that this is a pretext case because there is no evidence that it had legitimate *and* illegitimate reasons for discharging Winter and because Winter does not concede that it had any legitimate reason to terminate his employment. The court agrees. Accordingly, this case will be analyzed pursuant to the burden-shifting

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[4] In *Read,* the Fifth Circuit cited to *Desert Palace;* however, it applied the *McDonnell Douglas* burden-shifting framework to the plaintiff's sex and age discrimination claims. If the Fifth Circuit believed that *Desert Palace* abrogated the burden-shifting framework set forth in *McDonnell Douglas,* it certainly would have deemed it necessary to elevate *Read* to the status of a published opinion, rather than making it an unpublished opinion having no precedential value.

framework under *McDonnell Douglas.* Nevertheless, even if the court applied the "mixed motives" analysis, the ultimate burden of proving intentional discrimination remains with the plaintiff. *See Texas Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *see also Read*, 72 Fed. Appx. at 115 (citing *Desert Palace*, 539 U.S. at ___, 123 S.Ct. at 2150).

1. Discrimination

Winter brings claims of race and national origin discrimination[5] under Title VII and § 1981.[6] Under the applicable burden-shifting paradigm for Title VII and § 1981 [7] discrimination claims, Winter must establish a *prima facie* case of

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[5] Although Winter contends that he was discriminated against because of his national origin (Nigerian) and color (black), his claims are indistinguishable. *See Bullard v. OMI Georgia, Inc.*, 640 F.2d 632, 634 (5th Cir. Unit B 1981) (In some contexts, national origin and racial discrimination are "so closely related . . . as to be indistinguishable."). Therefore, the court finds that Winter's race and national origin are so closely related that a separate claim for race discrimination would merely duplicate the national origin discrimination claim. The summary judgment evidence make it unequivocally clear that national origin discrimination is being asserted, and the claims of racial discrimination are simply superfluous. For this reason, the court does not consider them to be separate and distinct claims. Even if one could consider them as separate and distinct claims, the race discrimination claim necessarily fails for the same reasons that the national origin claim fails.

[6] When they are urged as parallel causes of action, the same standard of proof applies to Winter's disparate treatment claims under both Title VII and § 1981. *Shackelford v. Deloitte & Touche, LLP.*, 190 F.3d 398, 403 n. 2 (5th Cir.1999); *Baltazar v. Holmes*, 162 F.3d 368, 373 (5th Cir.1998). For this reason, Winter's Title VII and § 1981 discrimination claims will be analyzed together.

[7] The burden-shifting analysis prescribed in *McDonnell Douglas* for employment discrimination claims is also applicable in suits brought under § 1981. *See Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir.1996).

discrimination; Bank of America must then articulate a legitimate, nondiscriminatory reason for its action; and finally, if the parties satisfy their initial burdens, the case reaches the "pretext stage," and Winter must then adduce sufficient evidence to permit a reasonable trier of fact to find pretext or intentional discrimination. *See McDonnell Douglas Corp.*, 411 U.S. at 802-04; *Burdine*, 450 U.S. at 252-53; *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 425-26 (5th Cir.2000). To establish a *prima facie* case of discrimination for a discharge, Winter must establish: (1) that he is a member of a protected class; (2) that he was qualified for the position; (3) that he was terminated from the position; and (4) that he was replaced by a person outside the protected group, or that he was discharged because of his national origin. *See Byers*, 209 F.3d at 426-27.

Bank of America concedes that Winter can establish a *prima facie* case. Winter contends that this concession precludes summary judgment in favor of the Bank. Specifically, he contends that the existence of a *prima facie* case not only establishes sufficient evidence upon which a reasonable jury could find discrimination but also shifts the burden of proof. The court disagrees. While Winter is correct that a plaintiff can survive summary judgment if a *prima facie* case is established and the defendant does not rebut the presumption of discrimination created by the *prima facie* case, this is not the case here. Bank of America has proffered several reasons as legitimate, nondiscriminatory reasons for discharging Winter. Further, Winter bears the ultimate burden of proving, by a preponderance of the evidence, that the Bank intentionally discriminated against him because of his national origin." *Burdine*, 450 U.S. at 253; *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 219 (5th Cir.2001)).

The court now turns to whether Bank of America has articulated legitimate, nondiscriminatory reasons for terminating Winter's employment. Bank of America contends that

it discharged Winter because of (1) an inordinate number of complaints; and (2) his unprofessional demeanor and insubordinate behavior. As these are legitimate, nondiscriminatory reasons to discharge an employee, Bank of America has met its burden. Now, the burden shifts back to Winter to demonstrate that Bank of America's articulated reasons are a pretext for intentional discrimination.

After a Title VII case reaches the pretext stage, the question for summary judgment is whether a rational factfinder could find that Bank of America intentionally discriminated against Winter on the basis of his national origin. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). A "plaintiff can survive summary judgment by producing evidence that creates a jury issue as to the employer's discriminatory animus or the falsity of the employer's legitimate nondiscriminatory explanation." *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir.2002). "Pretext-plus" is not required to support an inference of retaliatory discrimination. *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 223 (5th Cir.2000). "[A] plaintiff' prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminate," and may therefore be enough to prevent summary judgment or judgment as a matter of law. *See Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *Sandstad*, 309 F.3d at 897. This showing, however, is not always enough to prevent summary judgment "if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Reeves*, 530 U.S. at 148. On the other hand, in the context of an unlawful discrimination or retaliation claim,

summary judgment is inappropriate "if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that [national origin] was a determinative factor in the actions of which [a] plaintiff complains." *Vadie v. Mississippi State Univ.*, 218 F.3d 365, 373 n. 23 (5th Cir.), *reh'g denied,* 232 F.3d 212 (5th Cir.2000), *cert. denied,* 531 U.S. 1113, 121 S.Ct. 859, 148 L.Ed.2d 772 (2001) (quoting *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir.1996)) (*en banc*).

Winter contends that Bank of America's proffered reasons for his discharge are false. In support of his argument that a pretext exists, Winter contends that (1) the complaints in question were fabricated or a result of misunderstandings; (2) his alleged unprofessional behavior was exaggerated; and (3) a litany of other acts [8] of alleged disparate treatment viewed as a whole support a finding of discrimination. The court determines that Winter has failed to establish that Bank of America's articulated reasons for his discharge were a pretext for intentional discrimination.

First, with respect to the complaints, Winter mistakenly believes that a letter of commendation, dated October 26, 2001,[9] and a subsequent e-mail, dated October 31, 2001, detailing a complaint against Winter by the same customer who sent the letter of commendation call into question all of the complaints filed against him. Winter relies on the

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[8] Winter admits that "he does not seek a remedy for [these] acts, but tenders this evidence as background evidence to prove discrimination and retaliation in his discharge." Plaintiff's Brief Supporting His Response to Defendant's Motion for Summary Judgment ("Pl.Resp.") at 19-20. Therefore, the court need not address the Bank's arguments that some of these acts are time-barred or do not constitute adverse employment actions cognizable under Title VII.

[9] Bank of America objects to the October 26, 2001 letter on the grounds of hearsay. The court overrules the objection.

testimony of Jiwanlal who allegedly stated that based on these two documents he questions all of the complaints against Winter. Winter further contends that prior to the discrepancy illustrated by these two documents he informed the Bank of the questionable nature of all the other complaints previously filed against him in his July 19, 2001 complaint against Singh. He contends, however, that the Bank failed to properly respond to his concerns in that it did not reprimand Singh or otherwise document his complaint in Singh's personnel file, and the personnel manager, Kanaga, failed to conduct a follow-up meeting with him.

Bank of America counters that Winter's termination was not based on either the October 26, 2001 letter or the October 31, 2001 e-mail as they were not received by the Bank until after his discharge. It discounts the testimony of Jiwanlal in which he allegedly states that these two documents call into question all the complaints against Winter. The Bank contends that Jiwanlal was confused and that his confusion is understandable, given that neither of these documents was considered at the time of Winter's termination. Bank of America also contends that these documents are not evidence of fraud as Winter implies but rather evidence of the fickle nature of that customer. Bank of America further counters that it conducted a reasonable review of Winter's complaint against Singh, including requiring her to address, in writing, each of his concerns. The Bank contends that after all the information was reviewed it concluded that no discrimination had occurred, and therefore no reprimand was necessary.

As an initial matter, the court notes that Winter misconstrues Jiwanlal's testimony and takes it totally out of context. The court does not know whether this was done inadvertently or intentionally; however, the effect is the same. Jiwanlal testified that, at best, the October 26, 2001 letter and October 31, 2001 e-mail would only call into question the reliability of the October 31, 2001 complaint. He specifically

states that these documents do not create any doubt as the to reliability of all the other complaints. Appendix to Plaintiff's Brief Supporting His Response to Defendant's Motion for Summary Judgment ("Pl.App.") at 270 (59:10-18).[10] Contrary to Winter's representations to the court, Jiwanlal testified as follows: "But I would *not* say that I'm going to question—I would personally question all of the complaints because of these two letters." Pl.App. at 271 (60:1-3) (emphasis added).

The Bank offers no evidence to support its contention that the October 26, 2001 letter and October 31, 2001 e-mail were not considered when the decision to discharge Winter was made. Nonetheless, even if these documents create a fact question, they do so only as to the validity of this customer's complaint. Winter has offered no competent summary judgment evidence[11] to dispute the existence of the other documented complaints lodged against him in the six months preceding his termination. An "employer may fire an em-

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[10] Jiwanlal testified as follows when questioned about the October 26, 2001 letter and the October 31, 2001 e-mail:

> Q. Does that obvious conflict within two or three days of each other cause you any concern about the reliability of alleged customer complaints that you were hearing about?
>
> A. This one it does but—
>
> Q. Does it create any doubt about any of the others?
>
> A. No, sir, not all of them because I've read several of them and as I indicated before, they all can't be—
>
> Q. They all can't be bogus?
>
> A. Yeah, or manufactured or whatever. I mean, I just—

Pl.App. at 270 (59:10-18).

[11] Bank of America objects on the grounds of hearsay to the allegations in paragraphs 12 and 13 of Winter's affidavit relating to his alleged conversations with customers regarding their complaints. The court sustains the objection, and such statements will not be considered. *See Eason*, 73 F.3d at 1325.

ployee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." *Nix v. WLCY Radio*, 738 F.2d 1181, 1187 (11th Cir.1984) (citing *Megill v. Board of Regents*, 541 F.2d 1073, 1077 (5th Cir.1976)). "[E]ven an incorrect belief that an employee's performance is inadequate constitutes a legitimate, nondiscriminatory reason. We do not try in court the validity of good faith beliefs as to an employee's competence. Motive is the issue. . . . [A] dispute in the evidence concerning job performance does not provide a sufficient basis for a reasonable factfinder to infer that [the] proffered justification is unworthy of credence." *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir.1995) (quoting *Little v. Republic Refining Co., Ltd.*, 924 F.2d 93, 97 (5th Cir.1991). Further, there is no competent summary judgment evidence that he was treated differently than other similarly situated employees. Accordingly, Winter has not established the existence of a fact question regarding whether the complaints upon which his termination was based were merely a pretext for discrimination.

Second, Winter contends the characterizations of his demeanor and behavior are not credible because the only "witnesses" are Singh and Jiwanlal and because the Bank did not offer any evidence that his former supervisor considered his demeanor or behavior problematic.[12] Bank of America counters that Winter's unprofessional behavior and demeanor were witnessed by more people than just Singh and Jiwanlal, including a co-worker who had personal knowledge of his "belligerent" attitude with a customer and Singh's assistant and two other employees who were frightened by Winter's

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[12] Winter contends that his former supervisor, Joyce Condit, attempted to rehire him after his discharge. Bank of America objects on the grounds of hearsay to the references in paragraph 18 of Winter's affidavit relating to any alleged out-of-court statements by his former supervisor, Joyce Condit. The court overrules the objection.

conduct towards them. Indeed, the Bank notes that during the unemployment compensation process, Winter admitted that at the October 24, 2001 meeting he became upset and angry and walked out of the room. It further contends that it need not present any evidence that his former supervisor experienced problems with his demeanor and behavior because such evidence is irrelevant. The court agrees. The court determines that Winter has offered no competent summary judgment evidence to establish pretext, or create a genuine issue of material fact, with respect to the Bank's characterization of his behavior as insubordinate and unprofessional; nor has he offered any evidence that he was treated differently than other similarly situated employees.

Third, Winter's reliance on the other acts of alleged disparate treatment is misplaced. Winter contends that pretext is established because the following acts constitute disparate treatment: (1) he was not assigned to work in the Bank's Park Cities branch office; (2) he received substandard portfolios; (3) he was given accent management classes; (4) he was without an office for five weeks; and (5) he was not promoted to the position of vice president.

With respect to the Park Cities' assignment, Winter contends that the fact that he was not given this assignment is evidence of discrimination. Bank of America offers evidence that the employee selected for the assignment was better qualified than Winter in that the employee had previously worked in that location and thus had experience with the clientele. The Bank also contends that Winter offers no evidence to dispute its reason for not selecting him for the assignment. The court agrees. Winter's conclusory assertion that he was not selected for the assignment because of his national origin is not competent evidence of discrimination. *See Forsyth*, 19 F.3d at 1533.

With respect to the substandard portfolios, Winter states in his affidavit that he was the only client manager who did not receive a portfolio of existing customers. Winter, however, testified in his deposition that he received a portfolio of at least 260 *existing customers.* Winter does not explain why his affidavit varies from his deposition testimony. Unexplained variances between statements in an affidavit and sworn testimony cannot create a fact question that precludes summary judgment. *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495 (5th Cir.1996). Thus, the portions of Winter's affidavit that vary from his sworn deposition testimony are not competent summary judgment evidence, and the court will not consider them. *See id.* Even if Winter had received a less desirable portfolio, he has not presented any evidence to rebut the Bank's explanation for the manner in which portfolios were assigned the to client managers. Therefore, Winter's conclusory assertion that he was given a substandard portfolio because of his national origin is insufficient to establish or create a genuine issue of material fact regarding discrimination because of his national origin. *See Forsyth*, 19 F.3d at 1533.

With respect to the accent management classes, although Winter concedes that "he did not have a problem with the training" (Pl.App. at 48 (35:20-25)), he contends that "no other client managers, with heavy accents, had to attend the classes." Winter, however, does not identify "the other client managers with heavy accents" to which he refers. Thus, the court cannot determine if Winter compares himself to employees who are similarly situated. Further, there is no evidence that the classes were mandatory. Thus, it is conceivable that "the other client managers with heavy accents" to which Winter refers could be individuals of Nigerian descent who declined the opportunity to take these classes. Thus, Winter fails to make a showing that he was treated differently than other similarly situated employees.

With respect to the office issue, Winter contends that he was without an office for five weeks after being promoted to client manager. Bank of America counters that Winter, who was the last person to be offered the position of client manager, was one of two who did not have the requisite licenses for the position. It contends that because of logistical problems, Winter and the other unlicensed client manager did not have permanent offices while they studied for their license examinations. The Bank further offers evidence that Winter received his permanent office before the other client manager. Even if Winter had received his office last, he has not presented any evidence to rebut the Bank's explanation for his not having received an office immediately upon his promotion to client manager. While it is true that he did not have an office for five weeks, Winter's conclusory assertion that the reason that he did not have one is because of his national origin is not competent summary judgment evidence. *See Forsyth*, 19 F.3d at 1533.

With respect to the vice president position,[13] Winter contends that he was treated differently than Derwood Richardson, a white client manager who was promoted to vice president. Bank of America counters that Winter and Richardson were not similarly situated because Richardson did not have as many complaints lodged against him as did Winter.[14] Winter provides no evidence that complaints were

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[13] Winter does not bring a failure to promote claim against Bank of America. Pl. Resp. at 20. Instead, he tenders this issue as "background evidence" to support his discriminatory discharge claim.

[14] Bank of America also contends that the standards for promotion to the position of vice president changed after Richardson was promoted to vice president. Whether a fact question exists regarding promotion to vice president is of no moment because this issue is not before the court, as Winter does not allege in his complaint a failure to promote claim against the Bank. Thus, a fact question, if any, is not a *material* fact question that can preclude summary judgment. *See Anderson*, 477 U.S. at 248.

filed against Richardson as frequently as against him. *See also Telkamp v. Stein Mart, Inc.*, 2002 WL 324288 * 7 n. 4 (N.D.Tex.2002) (holding that the plaintiff who received a final warning as a result of a workplace incident was not similarly situated to the other employee involved in the incident who did not receive a final warning because the plaintiff had previous disciplinary complaints). "[T]he conduct at issue is not nearly identical when the difference between the plaintiff's conduct and that of those alleged to be similarly situated accounts for the difference in treatment received from the employer." *Wallace*, 271 F.3d at 221 (citation omitted). Therefore, Winter failed to establish that he and Richardson were similarly situated.

The court has addressed and disposed of the arguments asserted by Winter for his belief that the stated reasons by Bank of America were a pretext for intentional discrimination. Bank of America, however, sets forth other evidence which negates the existence of pretext. First, Winter was not treated differently than any similarly situated employee. The undisputed evidence reveals that no other employee had the documented interpersonal and behavioral problems as did Winter. Second, Singh both promoted and fired Winter. Under the "same actor" doctrine, when the same individual makes the decision to hire the plaintiff and later to fire the plaintiff, there is an inference that [national origin] discrimination was not the motive behind [the] termination." *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir.1996). The reason for the doctrine is that the decisionmaker's presumed animus against the protected class, as the motive for the termination, is inconsistent with the decision to hire the plaintiff in the first place. *Id.* The "same actor" doctrine creates only an inference, which can be overcome by sufficient evidence the that stated reason for the termination was pretext for discrimination. *Id.*

Winter contends that whatever weight the same actor doctrine might have it is nullified by discriminatory comments allegedly made by Singh. Singh allegedly told Winter that (1) he should get his teeth fixed; (2) he should wear nicer work clothes; (3) his accent was too prominent; (4) rich white women in the Highland Park area did not like dealing with minorities, especially black men; and (5) she suspected a Nigerian client when she learned that the client's account had been the subject of a fraudulent wire transfer that originated in Nigeria.

With respect to the first two comments, the court determines that they do not even arguably involve discriminatory animus. To the court's knowledge, no racial or ethnic group has a monopoly on good teeth or nice clothes. Although these comments can be considered insensitive, offensive and rude, they are insufficient to infer national origin discrimination. *See Boyd v. State Farm Ins. Cos.*, 158 F.3d 326, 329-30 (5th Cir.1998), *cert. denied,* 526 U.S. 1051, 119 S.Ct. 1357, 143 L.Ed.2d 518 (1999) ("The mere utterance of a racial epithet is not indicia of discrimination under Title VII".). While the third comment could arguably involve discriminatory animus, the facts in this case negate such a finding. It is undisputed that Winter acknowledged that his accent was prominent and appreciated being offered the accent management classes. Indeed, Winter admits that the classes assisted him in achieving one of his personal goals.

Bank of America contends that the last two comments amount to stray remarks. The court agrees. Stray remarks can be considered as evidence of pretext (as Winter argues), but only when accompanied by sufficient indicia of relevance—essentially, the four-part test originated in *Brown* and still recognized by the Fifth Circuit post*Reeves:* For comments in the workplace to provide sufficient evidence of discrimination, they must be (1) related to the protected class of persons of which the plaintiff is a member; (2) proximate in

time to the terminations; (3) made by an individual with authority over the employment decision at issue; and (4) related to the employment decision at issue. *Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 405 (5th Cir.2001) (citations, internal quotation marks, and internal brackets omitted). Given the state of the evidence, assuming Singh made the statements attributed to her, the court characterizes them as stray remarks which are offensive and rude but insufficient to infer discrimination. *See Boyd*, 158 F.3d at 329-30.

The evidence in this case clearly reveals that Winter was terminated, not for his national origin, but because of the number of complaints filed against him and his unprofessional and insubordinate behavior. The court will not second-guess the Bank's personnel decision. *See Walton v. Bisco Indus., Inc.*, 119 F.3d 368, 372 (5th Cir.1997). Moreover, no evidence in the record creates an issue of fact that Bank of America treated Winter differently from other similarly situated employees. Accordingly, summary judgment is appropriate on behalf of Bank of America on Winter's discrimination claims.[15]

2. Retaliation

Winter also brings a retaliation claim. Specifically, Winter contends that he was discharged for submitting his July 13, 2001 complaint against Singh.

Title VII makes it "an unlawful employment practice for an employer to discriminate against any of his employee" who had either availed themselves of Title VII's protections or assisted others in so doing. *See* 42 U.S.C. § 2000e-3(a).

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[15] Winter's § 1981 claim fails for the same reason as does his Title VII claim. *See Shackelford*, 190 F.3d at 403 n. 2; *Baltazar*, 162 F.3d at 373.

Winter offers no direct evidence of retaliation.[16] The court therefore assesses his claims under the *McDonnell Douglas* framework. *See Montemayor v. City of San Antonio*, 276 F.3d 687, 692 (5th Cir.2001). To establish a *prima facie* case of retaliation under Title VII, a plaintiff must demonstrate that: (1) he engaged in a protected activity; (2) he experienced an adverse employment action following the protected activity; and (3) a causal link existed between the protected activity and the adverse employment action. *Id.; Mota v. University of Texas Houston Health Science Center*, 261 F.3d 512, 519 (5th Cir.2001). The burden of production then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action. *Id.* Once the defendant does so, the inference of discrimination created by the *prima facie* case disappears, and the ultimate question becomes whether the protected conduct was the "but for" cause of the adverse employment action. *Id.*

Bank of America has failed to establish that there is no evidence to support Winter's retaliation claim. Indeed, the Bank's entire brief, except for the legal standard for retaliation, is devoted to Winter's discrimination claims. Other than a recitation of the standard, there is no discussion or analysis of Winter's retaliation claim. The Bank appears to take the position that if no discrimination exists there can be no retaliation. Such a position does not correctly reflect the law. To prevail on a retaliation claim, one need not prove an underlying discrimination claim. *See Vadie*, 218 F.3d at 374 n. 24 (citing *Shackelford*, 190 F.3d at 405 n. 4). "Similarly, evidence sufficient to support a claim of retaliation is not necessarily sufficient to support a claim of discrimination." *Id.* Accordingly, Bank of America is not entitled to judgment as a matter of law on Winter's retaliation claim.

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[16] As the court determines that *Desert Palace* is inapplicable to a retaliation case, it declines Winter's invitation to apply the holding of *Desert Palace* to his retaliation claim.

B. Plaintiff's Motion for Partial Summary Judgment on Liability

Winter moves for partial summary judgment on the issue of liability. Specifically, he contends that because Bank of America conceded the existence of a *prima facie* case of discrimination and it failed to assert a "mixed motives" defense, he is entitled to judgment as a matter of law pursuant to the holding in *Desert Palace.* Bank of America counters that Winter misconstrues the holding and applicability of *Desert Palace,* and in any event, it asserted an affirmative defense broad enough to invoke a "mixed motives" defense.

The court has already determined that this case is not a "mixed motives" case, and it has granted summary judgment on Winter's discrimination claims to Bank of America. The court has also determined that *Desert Palace* is inapplicable to a retaliation claim. Accordingly, the court determines that Plaintiff is not entitled to judgment as a matter of law on the issue of liability.

IV. *Conclusion*

For the above stated reasons, genuine issues of material fact exist with respect to Winter's retaliation claim. Therefore, summary judgment is denied with respect to this claim. No genuine issues of fact exist with respect to Winter's discrimination claims. Thus, the court grants summary judgment on these claims. Accordingly, the court grants in part and denies in part Defendant Bank of America, N .A.'s Motion for Summary Judgment; and denies Plaintiff's Motion for Partial Summary Judgment on Liability. Plaintiff's discrimination claims under Title VII and § 1981 are dismissed with prejudice, and Plaintiff's retaliation claim remains for trial.